INDEX

CITATIONS

525109—59——1

Constitution, Statutes and Articles of War:

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 58

ALBERT H. GRISHAM, PETITIONER

v.

CHARLES R. HAGAN, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals (R. 22–26) is reported at 261 F. 2d 204. The opinion of the District Court (R. 15–21) is reported at 161 F. Supp. 112.

JURISDICTION

The judgment of the Court of Appeals was entered on November 20, 1958 (R. 27). The petition for a writ of certiorari was filed on February 16, 1959, and granted on April 27, 1959 (R. 29), 359 U.S. 978.[1] The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

[1] The petition was granted *sub nom. Grisham* v. *Taylor*, and at the same time an order was entered substituting Charles R. Hagan, Warden, as party respondent (R. 29).

QUESTIONS PRESENTED

1. Whether, in the light of the decision in *Reid* v. *Covert,* 354 U.S. 1, Article 2(11) of the Uniform Code of Military Justice is severable so as to permit the court-martial of an employee of the armed forces serving with the armed forces overseas who commits a capital offense against a citizen of the United States in a foreign country.

2. Whether Article 2(11) of the Uniform Code of Military Justice is constitutional as applied to a person employed by the armed forces and serving overseas who commits a capital offense against a citizen of the United States in a foreign country.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The following provisions of the Constitution are involved:

> Article I, Section 8. The Congress shall have Power * * *
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> Clause 14. To make Rules for the Government and Regulation of the land and naval Forces. * * *
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> * * * * *
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> Clause 18. To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.
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> * * * * *
>
> Amendment V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the

land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The pertinent provisions of the Uniform Code of Military Justice, Act of May 5, 1950, c. 169, Sections 1–2, 64 Stat. 108, 109, 145, provide:[2]

> ARTICLE 2 [50 U.S.C. 552]. *Persons subject to the Code.* The following persons are subject to this Code:
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> * * * * *
>
> (11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces within the continental limits of the United States and without the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands.
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> * * * * *

SECTION 2. If any article or part thereof, as set out in section 1 of this Act, shall be held invalid, the remainder shall not be affected thereby.

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[2] Petitioner's trial occurred prior to January 1, 1957, the effective date of enactment of the Uniform Code of Military Justice into positive law. Accordingly, references are to Title 50.

STATEMENT

Petitioner, a citizen of the United States, was a cost accountant employed by the Corps of Engineers, Department of the Army, at Nashville, Tennessee, when, on September 30, 1952, he was assigned for temporary duty of six months with the Orleans District Engineer Office, Headquarters USAREUR Communications Zone, Orleans, France. His duties with the Army were to assist in setting up a cost accounting system for the building of the line of communication from Pardeau, France, to Kossalater, Germany (R. 12). This communications line was being constructed pursuant to this Government's NATO commitments.

Petitioner's transportation to Orleans, France, was furnished by the United States. Shortly after his arrival in France, on or about November 30, 1952, his dependent wife, Dolly Dimples Grisham, joined him (R. 13). Petitioner lived with his wife in an apartment in a private home in Orleans, France, and in lieu of having quarters furnished by the military he received a per diem allowance (R. 14–15). He was entitled to receive such military benefits as post exchange privileges, commissary privileges and transportation. His salary was paid by the United States Army Engineer Corps.

On December 7, 1952, petitioner was arrested by French police authorities and charged with the murder of his wife. The offense was alleged to have occurred on December 6, 1952. Subsequently, the French au-

thorities relinquished jurisdiction to the military authorities of the United States and petitioner was charged with the premeditated murder of his wife in violation of Article 118 of the Uniform Code of Military Justice (50 U.S.C. 712). At the arraignment, petitioner stood mute and a plea of not guilty was entered by the court-martial on his behalf (R. 6). Prior to the plea on the general issue petitioner had moved to have the charge dismissed on the ground that the court-martial lacked jurisdiction to try him for the offense charged. The basis of this motion was that jurisdiction over petitioner and over the offense remained with France and that the French authorities had not waived jurisdiction to the United States. This motion was overruled by the law officer (R. 7).

Petitioner was subsequently tried by court-martial convened in Orleans, France. He was found not guilty of premeditated murder but guilty of the lesser-included offense of unpremeditated murder. The court-martial sentenced him to life imprisonment. The convening authority reviewed the record of trial pursuant to the provisions of Articles 61 and 64 of the Uniform Code of Military Justice (50 U.S.C. 648 and 651), and approved the sentence. As required by Article 66 (50 U.S.C. 653), the entire record was forwarded to The Judge Advocate General of the Army for review by the Board of Review. Petitioner's appellate counsel filed an assignment of errors with the Board of Review in which it was claimed that pe-

titioner was not amenable to court-martial jurisdiction under Article 2(11). On December 11, 1953, the Board of Review entered its decision and approved the finding of guilty and sentence of the court-martial (R. 7-8).

Under the provisions of Article 67 of the Uniform Code (50 U.S.C. 654), the United States Court of Military Appeals granted petitioner a review of the decision of the Board of Review, and on September 24, 1954, the court affirmed this decision. *United States* v. *Grisham*, 4 U.S.C.M.A. 694, 16 C.M.R. 268. Final appellate review having been completed, the sentence was ordered into execution on October 15, 1954, and the United State Penitentiary at Lewisburg, Pennsylvania, was designated as the place of confinement.

On March 8, 1957, by clemency action, the Secretary of the Army reduced the period of confinement to 35 years (R. 8).

On October 26, 1957, petitioner filed a petition for a writ of habeas corpus in the District Court for the Middle District of Pennsylvania, alleging that Article 2(11) was unconstitutional, that the military authorities had no jurisdiction to try him, and that his confinement was therefore unlawful. After hearing, the District Court denied the petition (R. 21). On appeal, the Court of Appeals for the Third Circuit affirmed (R. 27).

SUMMARY OF ARGUMENT

I

Petitioner was tried by court-martial for having committed the capital offense of murder while he was serving in Orleans, France, as an employee of the Army, and was convicted of the lesser-included offense of unpremeditated murder (non-capital). In *Reid* v. *Covert,* 354 U.S. 1, this Court held that Article 2(11) of the Uniform Code of Military Justice cannot constitutionally be applied to civilian dependents accompanying members of the armed forces overseas who are charged with capital offenses. As we demonstrate in our brief in *McElroy* v. *Guagliardo,* No. 21, this Term, the decision in *Covert* is limited to cases involving dependents and is not applicable to employees serving with the armed forces.

The Uniform Code of Military Justice contains a severability clause manifesting the Congressional intention to permit the survival by severance of all valid parts from those declared to be invalid. Clearly, the "employed by" phrase of Article 2(11)—which is the one applicable here—is severable as a practical matter and under the Congressional design from the "accompanying" phrase which was considered in *Covert.* Critical distinctions of fact exist between the situations covered by the two phrases, for not only is there a difference with respect to the nature of the connection of the persons involved with the military, but the historical and

legal precedents also differ as to the two situations. There is every reason to believe that Congress intended to reach what it constitutionally could, and no evidence is available that Congress would have intended military jurisdiction over employees in capital cases to be destroyed merely because such jurisdiction had been struck down with respect to dependents.

II

As applied to this case, Article 2(11) is a proper exercise of the Congressional power to govern and regulate the military forces pursuant to Article 1, Section 8, Clause 14 of the Constitution.

A. As shown in our *Guagliardo* brief, the historical and legal precedents establish that non-uniformed persons, who have a close and real connection with our armed forces—particularly employees—have consistently been subject to court-martial jurisdiction where the authority of the civil courts does not extend. The test of this jurisdiction has always been the connection which the person sought to be court-martialed has with the military; the wearing of a uniform had not been determinative.

1. In accord with the British practice, which was established long prior to the Revolution, many employees of the forces have been made amenable to military jurisdiction consistently and uninterruptedly from the time Articles of War were enacted by the Continental Congress for the government of the American Revolutionary Army to the adoption of the present Uniform Code of Military Justice.

2. In providing for this military jurisdiction over employees, neither Congress nor its predecessor legislatures have recognized any distinction between capital and non-capital offenses. We have not found any actual American case involving a capital crime in peacetime, but that lack of authority is not at all dispositive. Until very recently, the United States has maintained large forces of military personnel and employees abroad only during or immediately after actual hostilities. Accordingly, until the post-World War II period there was very little occasion for the exercise of the power to try those connected with the military in areas where, as the British Articles of 1765 put it, "there is no Form of Our Civil Judicature in Force."

3. As was Guagliardo, this petitioner was an integral worker of our military establishment; he was an expert hired to perform functions in the military apparatus which were necessary to the proper operation of our armed forces abroad. Because of the interdependence of the uniformed personnel and employees serving with them, the aberrations of one affect the other, and the privileges and benefits which are peculiarly available to one are also available to the other.

4. Petitioner's assumption that a jury trial and grand jury indictment are at all times and under all circumstances available to civilians is clearly not well taken. It ignores the specific excepting clause of the Fifth Amendment, the intimate connection which employees have with the military establishment, and more particularly the fact that the first

Congress, contemporaneously with its adoption of the Fifth and Sixth Amendments, enacted Articles of War which provided for the exercise of court-martial jurisdiction over persons who were closely connected with the military but were not soldiers or officers.

B. A balancing of the various interests, such as was made by some of the Justices with respect to the dependents in *Covert*, favors court-martial jurisdiction over employees in all cases. The considerations favoring court-martial trial set forth in our *Guagliardo* brief, No. 21, also apply here in full force. And, unlike the case of dependents, these factors are not outweighed for employees charged with a capital offense by the nature of the offense. The history of military jurisdiction over employees is so long-established, so consistent, and so clear that it suffices, in and of itself, to call for a different disposition from that made in *Covert*. In addition, the relationship of these employees to the armed services is somewhat closer than that of dependents. These two factors—history and closer relationship—swing the balance the other way in this case.

ARGUMENT

I

THE "EMPLOYED BY" PHRASE OF ARTICLE 2(11) OF THE UNIFORM CODE OF MILITARY JUSTICE IS SEVERABLE FROM THE "ACCOMPANYING" PHRASE

Article 2(11) of the Uniform Code of Military Justice (*supra*, p. 3) provides for court-martial jurisdiction of persons "serving with, employed by,

or accompanying" the armed services overseas. Petitioner contends that the decision of this Court in *Reid* v. *Covert*, 354 U.S. 1—which held that Article 2(11) is unconstitutional with respect to dependents accompanying the armed forces who are charged with capital offenses—has the effect of rendering that Article unconstitutional in its entirety. This argument of the indivisibility of Article 2(11) relies wholly upon the decision and the reasoning of the Court of Appeals for the District of Columbia Circuit in *Guagliardo* v. *McElroy*, 259 F. 2d 927, No. 21, this Term. The rationale of that decision was expressly rejected by the court below in its ruling in this case (R. 23–26), and Point I of our *Guagliardo* brief (pp. 19–26) shows, we believe, the error in the District of Columbia Circuit's holding.

As we point out in *Guagliardo*, pp. 18–22, this Court held in *Covert* only that Article 2(11) cannot constitutionally be applied in time of peace to the court-martial of *civilian dependents* who are charged with *capital* offenses. The Court did not hold that no person not in uniform could be tried by a court-martial, or that no person not in uniform who is charged with a capital offense could be tried by a court-martial. The principal opinion, written by Mr. Justice Black, recognized that non-uniformed persons might, under certain circumstances, be "in" the armed services for purposes of military jurisdiction. 354 U.S. at 22–23. Further, both Mr. Justice Frankfurter and Mr. Justice Harlan emphasized in their separate concurrences that the Court was deciding only the question of the amenability to military jurisdiction of civilian dependents

accused of capital crimes. "The Court has not before it, and therefore I [Mr. Justice Frankfurter] need not intimate any opinion on, situations involving civilians, in the sense of persons not having a military status, other than dependents." 354 U.S. at 45. See also, 354 U.S. at 65. It is clear that the decision in *Covert* cannot be read to control this case as a matter of constitutional holding.

The problem, then, is whether, whatever the intended scope of the *Covert* holding, its effect is to render invalid the military trial of persons employed by the military who are accused of capital crimes, on the theory that this category of persons is either statutorily or inherently inseparable from that of dependents accused of capital offenses. However, the severability clause of the Uniform Code of Military Justice (Act of May 5, 1950, c. 169, Section 2, 64 Stat. 145) specifically provides that:

> If any article or part thereof, as set out in section 1 of this Act, shall be held invalid, the remainder shall not be affected thereby.

Article 2(11) specifically distinguishes between and applies military jurisdiction to three separate classes of persons: those serving with, those employed by, and those accompanying the armed forces outside the United States. In view of this statutory separation of the classes,[3] the very language of the severability clause precludes the automatic application, on grounds of inseverability, of a decision dealing with one of the

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[3] This case is therefore unlike *United States* v. *Reese*, 92 U.S. 214, where only one broad category was involved.

classes to another class. The severability clause, and the general rule that such a clause establishes a presumption of separability,[4] would permit the petitioner successfully to carry his burden of demonstrating inseparability[5] only if it appeared that Congress would have intended military jurisdiction over employees to fall because such jurisdiction had been struck down with respect to dependents. Petitioner has cited nothing which would support such a conclusion. On the contrary, as we indicate in our brief in *Guagliardo,* at pp. 23–24, there is every reason to believe that Congress would not have withheld court-martial jurisdiction over employees if it had known that it could not properly subject dependents to such jurisdiction.

It is true that in *Guagliardo* there is an added point of difference with *Covert* in that the offense Guagliardo committed was non-capital, while here, as in *Covert,* a capital crime was charged. But regardless of the offense involved, the distinction which exists between *Covert* and this case—that between employees and dependents—is a critical one for separability purposes. These classes are different in their relationship to the military and in the historical antecedents of that relationship (see pp. 14 ff., 24 ff., *infra*); a rule applicable to one cannot automatically be carried over to the other. Certainly, this should not be done where Congress, as here, has established a very broad direction of severability, covering specifically the separation

[4] *Williams* v. *Standard Oil Company*, 278 U.S. 235, 241–242.

[5] See *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 312, 322.

of valid parts of the statute from invalid parts. Accordingly, the constitutionality of Article 2(11) as applied to this case must be determined on its own merits.

II

ARTICLE 2(11) OF THE UNIFORM CODE IS CONSTITUTIONAL AS APPLIED TO AN EMPLOYEE OF THE ARMED FORCES SERVING ABROAD WHO IS CHARGED WITH COMMITTING A CAPITAL OFFENSE THERE

A. EMPLOYEES OF THE MILITARY SERVING IN AREAS TO WHICH THE AUTHORITY OF THE HOME COURTS DOES NOT EXTEND HAVE HISTORICALLY BEEN SUBJECT TO COURT-MARTIAL

A. In our brief in *McElroy* v. *Guagliardo,* No. 21, this Term, pp. 27–66, we present in some detail the historical materials which establish that civilians abroad, such as petitioner, closely connected with the armed services as employees, have consistently been subject to military jurisdiction. The test of court-martial jurisdiction was not, historically, premised on the wearing of a uniform; rather, amenability to trial and punishment by military authority has been based on the connection which the person had with the armed forces. Employees serving abroad who could be considered to be members of the "civil department" of the army have been deemed subject to military jurisdiction within the framework of the various Articles of War promulgated by the legislature, and no distinction has been drawn for capital cases.

1. Long prior to the American Revolution, it had been the English practice to make provision in the

Articles of War which governed the army for the court-martial of victuallers, sutlers, retainers to the camp, camp followers and of other persons directly connected with the army, irrespective of whether or not they were officers or enlisted soldiers. The Articles of War of James II contained such provisions.[6] The British Articles of 1765 which governed the British Army during the course of the American Revolution contained twelve articles providing for court-martial jurisdiction over persons who had a civilian connection with the army and who were neither soldiers or officers.[7]

Likewise during our Colonial and Revolutionary periods, the Articles of War which were adopted for the government of the American armies consistently made provision for court-martial jurisdiction over persons who were directly connected with the army. The first Articles of the Massachusetts Bay Colony, adopted April 5, 1775, had six Articles so providing, and in addition they were generally made applicable to "all Officers, Soldiers, and others concerned."[8] During the Revolution, the Articles of War adopted by the Continental Congress also included within the framework of the government and regulation of the army those who had a close connection with its operation, regardless of whether they wore uniforms. In the original Articles adopted June 30, 1775, nine of the sixty-nine rendered such persons amenable to mili-

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[6] See our brief in *Guagliardo*, at pp. 29–30.

[7] *Id.* at pp. 30–33.

[8] *Id.* at pp. 33–34.

tary jurisdiction;[9] and thirteen of the Articles adopted September 20, 1776, provided in the same manner for this military jurisdiction over such "civilians".[10] We have developed in *Guagliardo,* at pp. 37–40, that the jurisdiction so conferred was not reluctantly exercised; examples are given of its exercise over all who had a direct connection with the army, including wagon drivers, forage masters, sutlers, commissaries, etc.

From the time immediately subsequent to the adoption of the Constitution to the present, there has never been an occasion when provision was not made in the Articles of War for military jurisdiction over persons who because of their connection with the military were considered to be an integral part of our military forces, irrespective of the fact that they were not officers or soldiers. See our *Guagliardo* brief, pp. 41–51. For it was always recognized that the maintenance of an effective military apparatus requires the conferment of military jurisdiction over many persons who because of their direct connection with the military could seriously interfere with or affect military operations, particularly where our civil judicature would not operate.[11]

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[9] *Id.* at p. 34.

[10] *Id.* at pp. 35–37.

[11] See, also, St. George Tucker, *Blackstone's Commentaries With Notes of Reference to the Constitution and Laws of the Federal Government of the United States* (1803), Vol. 1, pt. 2, p. 408:

"THE military state includes the whole of the soldiery; or, such persons as are peculiarly appointed among the rest of the people for the safeguard and defence of the realm."

In support of his contrary contention that there is no long-established authority which would permit the trial by court-martial in a foreign country of civilian employees in time of peace, petitioner cites only *Lee* v. *Madigan*, 358 U.S. 228, 232–233, and Blackstone's *Commentaries*, Vol. I, pp. 412–413 (Br. 15–16). These authorities do not support his argument. *Lee* involved a military prisoner who was charged with murder while in custody of the army at Camp Cooke, California—where our civil courts were operating—in violation of Article of War 92.[12] The question which was determined by the Court was simply whether the offense, committed on June 10, 1949, occurred "in time of peace" within the statutory meaning of the Article.[13] Petitioner's allusion to Blackstone is equally inapposite, for the quotation cited is inapplicable to courts-martial as that term is used in the context of this case. The "martial law," which is criticized and condemned by Blackstone, is that system whereby the Crown, acting without the

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[12] In pertinent part this Article provided:

"* * * no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace." [10 U.S.C. 1564 (1946 ed., Supp. IV).]

[13] It is noted, however, that the Court quoted from Blackstone to the effect that (358 U.S. at 233)

"The necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land."

By that standard this case lies within the exception, because here court-martial jurisdiction was exercised over petitioner in an area where our courts were not open and justice could not have been afforded him "according to the laws of the land."

assent or approval of Parliament, would issue Commissions to Crown officers or appoint Crown officers to sit as judges for the purpose of punishing persons who had violated the authority of the Crown. Courts-martial, in modern legal parlance, are the tribunals of the code of military justice which has been promulgated by the legislature for the government of persons connected with the military forces. The crucial distinctions between these two concepts are detailed in Clode, *The Administration of Justice Under Military and Martial Law* (London, 1872), pp. 20–42, 156–165. The martial law which Blackstone and others have severely criticized is not the assertion of court-martial jurisdiction over military persons (or those directly connected with the military) but the asserted royal "arbitrary right to punish or destroy, without legal trial, any assumed delinquent." Clode, *id.* at p. 21.

2. Petitioner also lays great stress upon the fact that he has been unable to find case authority for permitting the court-martial of civilian employees in time of peace for capital offenses.[14] As we indicate in our brief in *Guagliardo*, pp. 39–40, 52–66, civilian employees have been tried by military courts throughout our history, both in time of war and in peacetime. It is true that none of the recorded cases or instances happened to involve a capital crime. However, that fortuitous fact is not at all decisive. If, as a matter of construction of Article I, Section 8, Clause 14 of

[14] However, as petitioner concedes in his reference to *United States ex rel. Mobley* v. *Handy*, 176 F. 2d 491 (C.A. 5), certiorari denied, 338 U.S. 904, there is such authority with respect to non-capital cases.

the Constitution—based upon the historical exercise of that power—the clause is sufficiently broad to encompass employees of the military in time of peace, then it also covers employees accused of capital offenses. Certainly, none of the historical or legal materials we have found suggests that the power to try employees connected with the military was limited—either prior to, at the time of, or subsequent to the adoption of the Constitution—to non-capital offenses. Congress and its predecessors did not so consider, and the constitutional power of Congress cannot be restricted by finding that it was only sparingly implemented in actual practice by the executive.

Beyond that, military trials of employees for capital offenses are not wholly unknown in historical records. In analyzing the British Article of War which extended court-martial jurisdiction over sutlers and retainers to the camp, E. Samuel, in his treatise, the *Historical Account of the British Army, and of the Law Military* (London, 1816), p. 695, describes the exercise of this authority in a case which is peculiarly pertinent here:

> At a court martial holden at *Mello,* 14th August, 1810, *J. Smyth, a private servant* to *Assistant Commissary Sawyer,* and a *follower of the army,* was arraigned for robbing his master of the sum of one hundred and six pounds sterling, or thereabouts, at or near *Formosa de Salvador,* on or about the 19th June, 1810, and on consideration of the circumstances of the case, and of the evidence adduced thereon, the court was of opinion, that the prisoner was guilty of the charge exhibited against him, being in breach of the Articles of War, and sentenced him the

> prisoner *J. Smyth,* a follower of the army, to be hung by the neck till dead—which sentence was confirmed and ordered to be executed on the Monday following.

We have been unable to find any equivalent American trials. That is not surprising, for the instances of the exercise of the power to try non-uniformed personnel in peacetime perforce had to be rare. Ever since the British Articles of War of 1765, the power to try such persons by court-martial has generally been limited to areas "where there is no Form of Our Civil Judicature in Force." Article II, Section XX of the Articles of 1765, Winthrop, *Military Law and Precedents,* 2d ed., Reprint 1920, p. 946. Until the period following World War II, United States troops (and the employees serving with them) were not stationed in peacetime in areas where our civil courts had no jurisdiction either in sufficient numbers or for sufficient periods of time to account for many cases of any kind, much less capital cases. Prior to that time, hostilities with enemies of the United States provided the only opportunities for stationing uniformed and non-uniformed members of the land or naval forces abroad, and the principal instances of the exercise of jurisdiction accordingly would have had to occur in conjunction with military expeditions. That explains the lack of recorded peacetime cases—which does not, however, indicate that the power fails to exist.

3. We have shown in our *Guagliardo* brief (pp. 66–71) that the relationship between a military employee, like petitioner, and the armed forces overseas is so direct and close that he may validly be subjected

to court-martial jurisdiction. Since it is not feasible to train those in uniform to perform all of the functions required by the vast military establishments which must be maintained in many countries overseas, civilians are hired or assigned to fulfill these duties and thus to contribute to the overall defense position of the United States.[15] These employees are an integrated part of the military apparatus. The loss of a civilian specialist would be felt as keenly by the military as would be the loss of a specialist wearing the uniform. Likewise, because of the integration of the two contingents, the adverse effect on the military contingent of the misconduct of a civilian employee would be as great as the misconduct of a soldier or airman. It is because of this almost total interdependence of the two groups that jurisdictional control of the military services over their employees is essential.[16]

It must be remembered also that civilian employees overseas are entitled to essentially all of the privileges accorded to military personnel. Some of these privileges are detailed in our brief in *Guagliardo*, at pp. 68–69. Equivalent privileges are not available to civilian employees of the military in this country—precisely because here employees of the services are merely a part of the general civilian population, whereas overseas such employees are not. Abroad, the employees of the American military services are considered by the local population, by the services,

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[15] Petitioner concedes (Br. 17) that civilian employees "are necessary and sometimes indispensable to the Armed Forces."

[16] See our brief in *Guagliardo*, pp. 75–82.

and by the employees themselves, to be a part of the American military group.

4. Like Guagliardo and Wilson, this petitioner argues strongly (Br. 10–22) that his trial abroad by court-martial violates the jury trial provision of the Sixth Amendment and the grand jury indictment portion of the Fifth Amendment. His contentions are largely based on the incorrect assumption that all "civilians," at all times, in all circumstances, are entitled to the benefits of a jury trial and a grand jury indictment. But as we have shown *supra* and in *Guagliardo,* the authorities have long recognized that some classes of persons may be "in" the military for purposes of court-martial jurisdiction (and thus outside the group to which the pertinent provisions of the Fifth and Sixth Amendments apply) even though they wear no uniform.[17] Status for purposes of military jurisdiction cannot be determined by simply ascertaining whether or not the person involved wears a uniform or has enlisted in or has been inducted into one of the armed services. What is, and has always been, decisive is the intimacy of the connection between the military service and the person over whom jurisdiction was sought to be exercised. Where, as here, the requisite direct connection exists, jurisdiction properly obtains under Article I, Section 8, Clause 14 of the Constitution. See also our *Guagliardo* brief, pp. 41–47.

Clearly, the first Congress, which adopted the Fifth and Sixth Amendments, entertained this concept of

[17] See, *e.g.*, Mr. Justice Black's opinion in *Covert*, 354 U.S. at 22–23.

military jurisdiction. Following the proposals made by the Constitutional Convention of the original States,[18] the Congress excepted from the jury requirements all "cases arising in the land or naval forces." That this exception was not meant to be limited to cases involving soldiers and sailors actually in uniform is shown by the significant historical fact that this same Congress adopted the then existing Articles of War, which were essentially those of 1776, for the government and regulation of the Army. Act of September 29, 1789, c. 25, Sec. 4, 1 Stat. 96. Thirteen of these Articles included military jurisdiction over persons who were not soldiers, but who were connected with the Army. See our brief in *Guagliardo,* pp. 35–36. And there is no evidence which would lead to the conclusion—and this Court has never held or assumed—that the Bill of Rights restricted Clause 14 in the manner petitioner suggests.

B. THE BALANCE OF INTERESTS FAVORS COURT-MARTIAL JURISDICTION OVER SUCH EMPLOYEES IN ALL CASES

1. In *Guagliardo,* at pp. 71–108, we have urged that (a) court-martial jurisdiction over civilian employees serving with the forces abroad is a practical necessity, (b) there are no acceptable alternatives, and (c) the procedures provided by court-martial are basically fair. These arguments apply, as well, to this case. We do not repeat or summarize them here,

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[18] See, *inter alia*, the proposals of Massachusetts, New Hampshire and New York, *Documentary History of the Constitution of the United States of America* (Dept. of State, 1894), Vol. II, pp. 93–95, 141–143, 191–192.

since this case is identical with *Guagliardo* [19]—except for the capital nature of the offense, which we discuss immediately below.

2. Petitioner suggests that the fact that he was accused of a capital crime ought to be taken into account when a balance of interests is struck. The *Covert* decision clearly indicates that, at least for some members of the Court, the nature of the offense is an important factor. But it is not true that, because a capital crime is at issue, all other considerations must automatically be disregarded and give way. No such mechanical rule can be applied when questions which have been characterized as being akin to those of due process are being weighed and balanced.

We submit that for employees no distinction should be made between capital and non-capital offenses. Employees differ from dependents in two important respects bearing directly on their amenability to military jurisdiction for all crimes: (a) the history of their connection with the forces, and of their coverage within court-martial jurisdiction; and (b) their current relationship to the armed services.

(*a*). Although we believe that there are strong historical materials supporting the exercise of military jurisdiction over *dependents* in non-capital cases (see our brief in *Kinsella* v. *Singleton,* No. 22, this Term, at pp. 15-30), we also believe that the history of the amenability of *employees* to court-martial is so convincing that, on the basis of that history alone, the Court should dispose of this case differently from

[19] In France, where petitioner was stationed, there were (as of March 31, 1959) 2,902 employees of the military.

Covert. To use the words of Mr. Justice Frankfurter in that case, in our view there has been a "well-established practice—to be deemed to be infused into the Constitution—of court-martial jurisdiction" (354 U.S. at 64) over employees. As shown in our *Guagliardo* brief, and *supra*, pp. 14–20, this history has been continuous from the 17th century; military jurisdiction over such persons was well-known to, and adopted, by the new government of this country both prior to and after the Constitution; it was recognized in peacetime as well as in war wherever the authority of the civil courts did not extend; and no distinctions have ever been made between capital and non-capital crimes. In short, this is a case in which the teachings of history dominate; other factors are dwarfed by the combined and consistent practice and understanding of all branches of government since colonial times.

(*b*). In addition, the relationship of these employees to the armed forces is somewhat closer than that of dependents. See our *Guagliardo* brief, pp. 66–71. As we say there, these employees are, in the most direct way, an integral part of, and "in", the forces overseas.[20] They work side-by-side with servicemen on projects of military significance; they are subject to the control of military superiors, and not infrequently military personnel are subject to their control and direction; they enjoy the privileges provided by the military for servicemen; to the local populace and government, they are part of the American military community and the military commander is responsible

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[20] See, *e.g.*, *Duncan* v. *Kahanamoku*, 327 U.S. 304, 313; *Toth* v. *Quarles*, 350 U.S. 11, 15; *Reid* v. *Covert*, 354 U.S. 1, 22–23.

for them; and they regard themselves as part of the military group and as responsible to the military commander. Moreover, their work and services are needed and vital, particularly under present-day conditions.

These two factors, differentiating this case from *Covert,* lead to the conclusion that employees should be and are wholly amenable to court-martial jurisdiction. In capital cases, the factors tending against trial by court-martial may be the same for employees as for dependents, but the factors sustaining military jurisdiction over employees are greater. The balance therefore swings the other way.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

J. LEE RANKIN,
Solicitor General.
JOSEPH M. F. RYAN, JR.,
Acting Assistant Attorney General.
HAROLD H. GREENE,
WILLIAM A. KEHOE, JR.,
Attorneys.

PETER S. WONDOLOWSKI,
Lieutenant Colonel, JAGC,
Office of The Judge Advocate General,
United States Army.

WILLIAM M. BURCH, II,
Major, USAF,
Office of The Judge Advocate General,
United States Air Force.

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